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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNIVERSAL RESTAURANTS, INC.,
Petitioner,

v.

LAURA FELLOWS,
Respondent.

Petition For A Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

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QUESTION PRESENTED

Whether, in employment discrimination cases, a complainant may permissibly bypass Title VII's voluntary compliance and conciliation procedures with respect to claims of across-the-board class-wide discrimination, by first raising those class allegations in the court complaint, notwithstanding that the complainant's previously filed EEOC charge alleged only isolated and personal harm affecting the complainant alone, and the investigation of the charge was reasonably limited by the EEOC to those purely individual claims?

LIST OF ALL PARTIES TO THE PROCEEDING BELOW

1. Universal Restaurants, Inc., Defendant-Appellee.*
2. Laura Fellows, Plaintiff-Appellant.
3. Equal Employment Advisory Council, Amicus Curiae.
4. Equal Employment Opportunity Commission, Amicus Curiae.

*Petitioner Universal Restaurants, Inc. has ownership interests in Universal Restaurants of San Antonio, Inc., and VEW, Inc.

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IN THE

Supreme Court of the United States

October Term, 1982

No. _____

UNIVERSAL RESTAURANTS, INC.,
Petitioner,

v.

LAURA FELLOWS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

UNIVERSAL RESTAURANTS, INC. petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 28, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals was reported at 701 F.2d 447 (5th Cir. 1983) (Appendix A), reversing and remanding the District Court's June 16, 1981 Order and Memorandum Opinion (Appendix B), which was unofficially reported at 26 Fair Empl. Prac. Cas. (BNA) 145 (N.D. Tex. 1981).

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals was entered on March 28, 1983 (Appendix C). This petition for a writ of certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

APPLICABLE STATUTORY PROVISIONS

Civil Rights Act of 1964, Title VII, as amended, Title 42 United States Code, §§ 2000e-2, 2000e-5(f)(1) (Appendix D).

STATEMENT OF THE CASE

Laura Fellows ("Fellows" or "Respondent") began employment with Universal Restaurants, Inc. ("Universal" or "Petitioner") on January 18, 1980 as a wine steward trainee. She was discharged from that position several days later on January 23, 1980. Thereafter, she filed an EEOC charge alleging (1) that she had been discharged from her wine steward position because of her sex; (2) that she had been paid less than male wine stewards because of her sex; and (3) that she had been rejected from initial hire as a waiter or captain at restaurants owned by Universal because of her sex. *See* Appendix A, 2.

In response to her charge, the EEOC made inquiries for information from Universal. Most of the requests related to the specific allegations of her EEOC charge, but the Commission included some *pro forma* requests regarding general personnel matters unrelated to Fellows' charge. With regard to those unrelated requests, Universal declined to provide information on the ground that the inquiries were outside the reasonable scope of the Fellows charge, and because the EEOC had made no showing of their relevance to

it (*See* Appendix B, 2-3). The EEOC did not thereafter pursue those data requests.[1]

The EEOC did not make an administrative determination on the merits of the charge, and subsequently issued Fellows a right-to-sue letter. Fellows thereafter brought suit in the District Court under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e *et seq.*, and under 28 U.S.C. §§ 1337, 1343(a)(4). Fellows brought this action on her own behalf with respect to the specific allegations of her EEOC charge, as well as on behalf of a purported class of females alleging that Universal maintains across-the-board sex discriminatory policies and practices in employment matters including recruiting, hiring, promotion and compensation.[2]

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[1] In its opinion, the Fifth Circuit took the position that these limited requests for information *suggested* a class investigation which would satisfy any requirement of notice to Universal regarding class claims. Appendix A, 10-11. This factually unsupported conclusion stands in unexplained derogation of uncontroverted record evidence *consisting of an affidavit from the Dallas District Director of the EEOC* which established that the EEOC never considered or investigated the Fellows EEOC charge on anything other than a purely individual basis, and that the Commission's well defined and substantial systemic case investigation unit and procedures, used for class investigations, were never utilized in connection with her charge. See the District Court's detailed findings at Appendix B, 9-10, 13. The Fifth Circuit also erroneously concluded that Ms. Fellows' EEOC charge implicated a failure to promote her (*See* Appendix A, 3), a finding as to which there is no record evidence whatsoever. Indeed, an allegation of failure to promote would be absurd since Ms. Fellows was only employed by Universal for a few days prior to her discharge.

[2] Fellows' "across-the-board" complaint was filed before this Court's decision in *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 102 S. Ct. 2364 (1982). Her complaint embraces a theory of alleged class-wide *disparate treatment*, but does not allege *adverse impact* arising out of application of facially neutral decision-making criteria. *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335, n. 15 (1977); *Pouncy v. Prudential Ins. Co. of America*, 668 F.2d 795, 799-802 (5th Cir. 1982).

In response, Universal moved to dismiss the class allegations for want of jurisdiction or failure to state a claim on the merits, arguing that Fellows' across-the-board class claims did not "reasonably grow out of" her inherently personal and specific EEOC charge allegations (*See* Appendix B, 4), and because the EEOC reasonably limited its investigation to the individual allegations made by Fellows in her administrative charge. Under these circumstances, Universal urged that Title VII's preferred and intended method for dispute resolution, informal discussion and conciliation through the EEOC, was never given an opportunity to function with respect to those class issues.

The District Court agreed with Universal's arguments, and dismissed the class aspects of the case, reasoning that in the absence of an EEOC charge or investigation reasonably raising issues of a pattern and practice of class-wide sex discrimination, there had never been an opportunity for Title VII's voluntary compliance mechanism to meaningfully function with respect to class issues, and accordingly, the trial court lacked jurisdiction to proceed upon them.[3] *See* Appendix B, 11-14.

Fellows responded to the District Court's class dismissal order by seeking discretionary interlocutory review in the United States Court of Appeals for the Fifth Circuit pursuant to the Interlocutory Appeals Act, 28 U.S.C. § 1292(b). The Fifth Circuit agreed to

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[3] The District Court dismissed the class allegations on *jurisdictional* grounds rather than for *failure to state a claim* because the Fifth Circuit had earlier characterized as *jurisdictional* the appropriate legal standard: "We find that the district court had jurisdiction ... under the *Sanchez* standard." *Falcon v. General Telephone Co. of the Southwest*, 626 F.2d 369, 377 (5th Cir. 1980), *vacated and remanded on other grounds*, 450 U.S. 1036 (1981), *on remand*, 697 F.2d 633 (5th Cir. 1981), *rev'd and remanded on other grounds*, 457 U.S. 147, 102 S. Ct. 2364 (1982).

review the order,[4] and after hearing, reversed and remanded the District Court's dismissal for further proceedings.[5] The appeals court based its reversal upon findings that (1) the jurisdictional basis for dismissal was improvident because the class claims were not wholly insubstantial or frivolous, and (2) that on the merits, the class claims were sufficently "like or related to" Fellows' individual claims so as to permit them to proceed.[6] From this adverse judgment and opinion, Petitioner seeks relief from this Court.

REASONS FOR GRANTING THE WRIT

A. The Fifth Circuit's Holding That Claims Of Class Discrimination Need Not Be Administratively Presented To The Employer Before Proceeding

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[4] At this juncture, the Equal Employment Advisory Council entered the case as an Amicus Curiae urging affirmance of the District Court's order, and the Equal Employment Opportunity Commission entered as an Amicus Curiae urging reversal.

[5] While it is clearly this Court's normal practice to deny interlocutory review, in situations where there is a clear-cut and important issue of federal law fundamental to further conduct of the case that would otherwise qualify as a basis for certiorari, this Court has found interlocutory review to be appropriate. *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *See also*, R. Stern & E. Gressman, *Supreme Court Practice*, §§ 4.19, 4.20 (5th ed. 1978). Moreover, a primary focus on whether to grant certiorari must include the broad public importance of the issue presented. *See* Rule 17, Rules of the United States Supreme Court. In the instant case, the issue presented undeniably involves a profound question regarding basic requirements for the enforcement of Title VII.

[6] Significantly, the second half of the Fifth Circuit's opinion dealt with whether Fellows stated class claims on the merits which could survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6). Since the District Court dismissed the class allegations for lack of jurisdiction, and only certified that basis for review under 28 U.S.C. § 1292(b), the Fifth Circuit questionably decided an issue which had not been put before it.

With Them In Court Impermissibly Emasculates The Congressional Mandate That During The EEOC Review Phase Of Title VII Charges, An Employer Is Entitled To An Informed Opportunity To Consider Voluntary Settlement.

Congress and the courts have made clear that voluntary settlement through informal means of discussion and conciliation is the intended and preferred method for resolving Title VII employment discrimination claims.[7] *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975). Resort to the courts is intended to be the exception rather than the rule, to be utilized only when Title VII's comprehensive administrative settlement and enforcement machinery, implemented through the EEOC, has been exhausted. To that end, the Fifth Circuit's seminal decision in *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970) set out the fundamental proposition that Title VII "clearly contemplates that no issue will be the subject of a civil action until the EEOC has first had the opportunity to obtain voluntary compliance." 431 F.2d at 467. From this basic postulation has emerged the standard that Title VII complainants may only litigate those issues which are "like or related to" or "within the reasonable scope of" the issues raised before the EEOC, or which arise as the result of the Commission's investigation.

For more than a decade, a litany of cases have grappled with defining precisely how to apply this rule to the varying realities of Title VII cases. It is clear that a focal point of conflict is balancing due process concepts of notice to the employer as against the remedial objective of protecting the victims of employment dis-

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[7] *See* 42 U.S.C. § 2000e-5(f)(1), set out in pertinent part in Appendix D.

crimination. The district court in *Hubbard v. Rubbermaid, Inc.*, 436 F. Supp. 1184 (D. Md. 1977) cogently explained the basic problem:

> When faced with the question of the proper scope of a Title VII complaint, a court must balance two competing statutory policies. The first is that Title VII is a broad remedial statute designed to protect those who are least able to protect themselves ... The second policy is that Title VII plaintiffs should not have an unrestrained ability to litigate allegations of discrimination which are neither contained in the EEOC charge nor investigated by the EEOC, thereby frustrating the statutory scheme of informal persuasion and voluntary compliance ... Unrestrained expansion of the scope of Title VII suits caused by judicial failure to honor the second of the policies will result in valid claims being lost in the ever-increasing number of Title VII suits. If properly applied, the second policy eliminates those portions of Title VII complaints which are inappropriate for litigation because investigation and conciliation have not been accorded their proper role. Unless the courts effectively employ the second policy, which in the last analysis is a restatement of traditional notions of fairness and due process to the employer, the remedial aspects of Title VII will be destroyed.

436 F. Supp. at 1188-90.

In a similar balancing of interests, the district court in *Jiron v. Sperry Rand Corp. (Sperry-Univac)*, 423 F. Supp. 155 (D. Utah 1975) synthesized the requirements of *Sanchez* by focusing upon the due process concept of notice to the employer regarding the nature and extent of claimed discrimination, and then determining whether there was in fact a reasonable opportunity to exhaust Title VII's voluntary compliance mechanism *over those issues* before resort to the court.

In the instant case, the fundamental issue is whether Title VII requires that claims of class discrimination be accorded, at a minimum, a meaningful *opportunity* for informal discussion and voluntary adjustment through the EEOC before such claims become the subject of court action.[8] Several courts have confronted this precise issue and barred class claims, finding that EEOC charges alleging isolated discriminatory acts affecting single complainants do not imply that a class of employees has been systematically discriminated against, and certainly do not put the respective employers on required notice of broad-based

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[8] Petitioner does not argue that actual conciliation must take place, but rather, that Title VII requires, at a minimum, due notice to the employer, either through the charge itself or the EEOC investigation thereof, in order that the employer be given an informed opportunity to consider settlement, or in the alternative knowingly accept the risk of defending against such issues in court.

class claims.[9] Nonetheless, the Fifth Circuit's rule in the instant case unquestionably and completely insu-

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[9] These concepts have been applied by several district courts for the *specific* purpose of barring class claims where such were not presented through the EEOC charge, or the resulting administrative investigation. Thus in *Metcalf v. Omaha Steel Castings Co.*, 507 F. Supp. 679 (D. Neb. 1981) *aff'd mem.* 676 F.2d 703 (8th Cir. 1981), the district court refused to permit plaintiff to amend his complaint for the purpose of adding class allegations of racially disparate treatment where his EEOC charge *specifically* alleged only an individual and isolated act of discrimination. In deciding the issue, the district court interpreted the Fifth Circuit's *Sanchez* decision to be fully applicable as a bar to the attempted expansion. *See also, Macon v. Bailar*, 451 F. Supp. 140 (E. D. Va. 1978). Likewise in *Stubbs v. Bendix Field Engineering Corp.*, 21 Fair Empl. Prac. Cas. (BNA) 804 (D. Md. 1977), the district court opined:

> In this case, the EEOC investigation was limited to the plaintiff's specific charges regarding unfair job performance evaluation, a lack of promotion or wage increases, and failure to be recalled from layoff. The complaint in this court, however, contained the additional allegations that defendant (1) failed to recruit black applicants for employment; (2) established discriminatory educational requirements; (3) maintained racially segregated work units; (4) utilized a seniority system; ... (5) utilized discriminatory tests for promotion and acceptance into training programs; and (6) excluded blacks from administrative, executive, and supervisory positions. The EEOC was neither charged with investigating such allegations, nor did it, in the course of the investigation which it did conduct, find reasonable cause to make such allegations *sua sponte. As a result, no opportunity ever existed to effect conciliation as to such matters. Since the statutory scheme of conciliation would be nullified if a private plaintiff could raise such issues in court the first time, the defendant's motion to dismiss [specified] paragraphs .. of the complaint is granted* [Emphasis added]. 21 Fair Empl. Prac. Cas. (BNA) at 806.

Similarly, in *EEOC v. Mallinckrodt, Inc.*, 22 Fair Empl. Prac. Cas. (BNA) 311 (E. D. Mo. 1980), the EEOC filed a broad-based class action suit jurisdictionally predicated upon an individual charge filed by an incumbent black employee claiming discriminatory promotion denial. The charge contained no class allegations or claim of discrimination affecting others. The court found the charge jurisdictionally inadequate to support the class suit, and therefore examined the EEOC's investigative file to determine whether the investigation had included an analysis of anything more than the isolated claims of the charging party. Since it had not, the district court characterized Plaintiff's efforts as "dangerously akin to a 'witch hunt'", and granted summary judgment for the defendant dismissing the class allegations. 22 Fair Empl. Prac. Cas. (BNA) at 314.

lates the requirement of subjecting class claims to Title VII's comprehensive voluntary compliance mechanism for complainants who may prefer that their class claims be presented in the first instance to a court rather than the EEOC. This bypassing of the Congressional enforcement machinery is not, Petitioner urges, permissible under Title VII.

B. The Fifth Circuit's Reasoning That Any Isolated Act Of Employment Discrimination Reasonably Implies A Pattern And Practice Of Purposeful Class Discrimination Is Inconsistent With Title VII, EEOC Enforcement Procedures, And Decisions Of This Court Regarding Standards For Determining The Nature And Extent Of Employment Discrimination.

The distinction between class versus isolated employment discrimination is fundamental to the fabric of Title VII and its interpretive precedent. Title VII itself makes this distinction by providing for two kinds of lawsuits — individual and "pattern and practice".[10] In either case, complainants cannot bypass the EEOC. Moreover, EEOC has formal and specific procedures for identifying cases requiring class investigation, and employs separate enforcement units for individual versus systemic discrimination investigations.[11] Thus, like the statute, the Commission recognizes this basic distinction, and exercises expertise in determining the existence of systemic versus isolated instances of individual discrimination. Similarly, in recognition of this distinction, this Court explained the fundamental statutory dichotomy in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), noting

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[10] *Compare* Title VII §706 *with* §707, 42 U.S.C. §§ 2000e-5, 2000e-6.

[11] *See* Appendix B, 10, 13.

that Title VII's "pattern and practice" language implies repeated and routine discriminatory operating procedure, not isolated or sporadic incidents.[12] Finally, in recently admonishing the Fifth Circuit with regard to its failure to apply the procedural rigors of Fed. R. Civ. P. 23 in Title VII class actions, this Court declared that "[i]f one allegation of specific discriminatory treatment were sufficient to support an across-the-board attack, every Title VII case would be a potential company-wide class action. We find nothing in the statute to indicate that Congress intended to authorize such wholesale expansion of class-action litigation." *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, ____, 102 S. Ct. 2364, 2371 (1982).

The courts have acknowledged that the two very different theories under which employment discrimination class actions may be litigated — *disparate treatment* and *adverse impact* — involve totally divergent requirements of proof, rebuttal and persuasion.[13] None-

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[12] 431 U.S. at 336.

[13] Under the *adverse impact* model, a complainant may attack employment selection criteria which, although facially neutral in form, fall more harshly on protected classes of persons, and are not justified by business necessity. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Pouncy v. Prudential Ins. Co. of America*, 668 F.2d 795 (5th Cir. 1982). The model is designed only to attack an "overt, clearly identified nondiscretionary selection criter[ion] that [was] applied at a single point in a selection process." D. Baldus & J. Cole, *Statistical Proof of Discrimination*, §1.23 at 16 (1982 Supp.) *approved in*, *Pouncy*, *supra* at 800. The theory is, however, improperly advanced in support of wide-ranging attacks upon the cumulative effects of an employer's practices, or for simultaneously challenging multiple employment practices. *Id.* On the other hand, the *disparate treatment* model is grounded upon the theory that "The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). In contrast with the *adverse impact* model, a *disparate treatment* case requires proof of discriminatory motive. *Pouncy*, *supra* at 801.

theless, under the Fifth Circuit's rule, a single allegation of isolated discriminatory treatment may permissibly serve as the trojan horse for launching a class-wide judicial assault *based upon either or both class action theories*, without the employer being given prior administrative notice, through the EEOC charge or the resulting investigation triggered thereby, of such systemic claims.[14] Petitioner submits that this distortion of the "like or related" and "reasonable scope" standards is neither warranted nor necessary, and is a conceptual first cousin to the Fifth Circuit's historical unwillingness to accord to the employer the procedural and substantive rights which are implicit in the balanced statutory scheme of redressing employment discrimination under Title VII.[15] Thus, like the Fifth Circuit's now invalid "across-the-board" class certification presumption recently struck down by this Court,[16] adherence to the proposition that every isolated EEOC charge implies purposeful class-wide discrimination is outdated, inconsistent with decisions of this Court as well as others, and wholly unfaithful to the comprehensive and balanced enforcement system devised by Congress for dealing with prohibited discrimination.

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[14] Since this Court's decision in *General Telephone Co. of the Southwest v. Falcon*, *supra*, the continuing viability of disparate treatment class actions may be in doubt.

[15] *See, e.g.*, *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982) [Title VII offers class litigants no exemption from compliance with the strict requirements of Fed. R. Civ. P. 23]; *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248 (1981) [Once complainant establishes a *prima facie* case of discriminatory disparate treatment, the employer has an obligation to rebut that showing by introducing *some* evidence of legitimate motivation, but the burden of persuasion, and the risk of nonpersuasion, never shift from the complainant].

[16] *General Telephone Co. of the Southwest v. Falcon*, *supra*.

C. The Fifth Circuit's Holding Presents A Recurring And Imperative Problem For Employers And The Courts Because It Fosters Trial-By-Ambush, And Encourages Improper And Unwarranted Proliferation of Title VII Class Actions As a Substitute For The Statutorily Required Voluntary Compliance Machinery.

If the Fifth Circuit's rule is left intact, the door is wide open for complainants to wholly bypass the EEOC with respect to class discrimination issues. In effect, a litigant may choose this circumvention for reasons no better than to obtain the far greater settlement firepower which a class action brings, or to avoid an EEOC determination of meritless class issues. By permitting this improper availability of class actions, the EEOC's role as the principal enforcer of Title VII will be emasculated in favor of trial-by-ambush and unfounded class action witch hunts. This distortion of Title VII's comprehensive enforcement scheme is neither statutorily sanctioned nor consistent with concepts of judicial economy.

Finally, it is significant that the rule applied by the District Court, requiring that employers be given meaningful notice of class-based claims before class litigation, denies no plaintiff his or her day in court. All those who file charges or share a common harm may institute original actions, or join into existing Title VII actions.[17] Thus, by requiring that appropriate notice of class issues be presented in order to trigger a meaningful opportunity for voluntary compliance and conciliation, this Court will unquestionably be effec-

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[17] *Compare Wheeler v. American Home Products Corp.*, 582 F.2d 891, 897 (5th Cir. 1977) *with Crawford v. United States Steel Corp.*, 660 F.2d 663, 665-66 (5th Cir. 1981).

tuating both the spirit and policy of Title VII, and will foster judicial economy by reserving the class action device only for those cases in which Title VII's administrative enforcement scheme has been utilized to its Congressionally mandated fullest.

CONCLUSION

Petitioner is guided by this Court's recent admonition to the Fifth Circuit that there is no Congressional intent that every isolated allegation of employment discrimination be deemed sufficient to support an across-the-board, company-wide class action against the employer. *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. at _____, 102 S. Ct. at 2371. Petitioner submits that the Fifth Circuit's failure to require meaningful administrative notice and opportunity for voluntary settlement to employers later charged with class-wide discrimination in court is no less egregious than the Fed. R. Civ. P. 23 distortion which prompted this Court's action in *Falcon*. For these reasons, Petitioner requests that this Court grant its Petition for a Writ of Certiorari.

Respectfully submitted,

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June 1983

APPENDIX A

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 82-1125

LAURA FELLOWS,
Plaintiff-Appellant,

v.

UNIVERSAL RESTAURANTS, INC.,
Defendant-Appellee.

Appeal From The United States District Court For The Northern District of Texas.

Entered March 28, 1983

Before WISDOM, RUBIN and TATE, Circuit Judges.

TATE, Circuit Judge:

Pursuant to 28 U.S.C. § 1292(b) certification, the plaintiff Ms. Fellows appeals from an interlocutory order dismissing the class action allegations of her suit against the defendant, her former employer ("Universal"). Her complaint is founded upon employment discrimination against her and other females in violation of Title VII ("Equal Employment Opportunities") of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. The district court held that it did not have jurisdiction over the class allegations of Ms. Fellows' complaint because she did not specifically state them in her initial charge of employment discrimination filed with the Equal Employment Opportunity Commission ("the EEOC"), nor had the Commission's administrative investigation included them within its scope. We reverse, finding that a dismissal for lack of jurisdiction is inappropriate because a non-frivolous federal question was presented that requires the exercise of juris-

diction by the district court, and because the initial charges of discrimination before the EEOC were sufficiently like or related to those asserted by the class action as to support a Title VII cause of action for the class.

The Factual Context

Ms. Fellows, after applying for a position with Universal Restaurants as a waiter or captain, was hired by the restaurant as a wine steward. Shortly thereafter, she was discharged from that position. Without counsel she filed a charge with the EEOC as is provided for under Title VII, 42 U.S.C. § 2000e-5(b), alleging that she had been discriminated against on the basis of sex in her hiring, pay, and discharge.[1] The charge was filed within the delay provided by the statute, *id.*, 2000e-5(e), a prerequisite for subsequent administrative or judicial action.

Pursuant to the Act, 42 U.S.C. § 2000e-5(b), the EEOC instituted an investigation of her charge and began attempts at conciliation between the parties.

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[1] Ms. Fellows' charge alleged:

I believe that I have been discriminated against because of my sex, female, in that:

1. Phil Varacharo paid the male Wine Steward $40.00 to $50.00 per shift plus a percentage of 2% over $200.00 and I was paid only $3.10 per hour for performing the same duties.
2. I performed all of my duties in an outstanding manner, and the discharge by Phil Varacharo was not justified.
3. I was the only female employed in the position of Wine Stewardess, and I believe I was paid less and discharged because of my sex, female.
4. Phil Varacharo denied my application for positions as a Waitress, and Captain in Marios, Les Saisons, and the Old Warsaw Restaurant owned by the above named employer because of my sex, female.

This investigation included requests for information from Universal relating to Ms. Fellows' employment, and also relating to other applicants and employees of the restaurant. Universal refused to answer the latter questions as beyond the scope of the investigation. The EEOC did not seek compliance from Universal and confined its investigation solely to the claim of individual discrimination.

Shortly after the charge was filed, Ms. Fellows retained counsel, and her attorney sent a letter to Universal stating that if an amicable settlement could not be reached, a class action lawsuit would be filed. Although attempts at conciliation were made, no settlement was obtained.

After failing to process Fellows' charge within 180 days, 42 U.S.C. § 2000e-5(f)(1), the EEOC issued a right-to-sue letter, and she filed this individual and class action suit alleging that Universal had discriminated against herself and other women on the basis of their sex in its recruitment, hiring, promotion, and compensation policies, all of which disciminatory conduct is implicated by Ms. Fellows' charge to the EEOC (at least as having affected her personally). *See* note 1 *supra*. On motion to dismiss by Universal for lack of jurisdiction, submitted with affidavits, the district court dismissed the class aspects of the suit, finding that the presence of either a class allegation in the EEOC charge or a class investigation by the EEOC was a jurisdictional prerequisite to a class action suit under Title VII, and that the conciliation policies of Title VII would not be served if the initial charge did not by its terms afford an opportunity for the employer to defend against, and the Commission to inves-

tigate, class discrimination not specifically complained of by the employee's initial EEOC charge.

Jurisdictional Test: In General

When a party files suit for relief under the United States Constitution or under federal statute, a federal district court may not dismiss the suit on jurisdictional grounds unless the court finds (1) that the federal claim is immaterial and made solely for the purpose of obtaining jurisdiction, or (2) that the federal claim is wholly insubstantial and frivolous. *Bell v. Hood*, 327 U.S. 678, 682-83, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946); *Miller v. Stanmore*, 636 F.2d 986, 989 (5th Cir. 1981); *Suthoff v. Yazoo County Industrial Development Corporation*, 637 F.2d 337, 339 (5th Cir. 1981), *cert. denied, sub nom Yazoo County Industrial Development Corporation v. Suthoff*, 454 U.S. 1157, 102 S.Ct. 1032, 71 L.Ed. 2d 316 (1982). Jurisdiction "is not defeated by the possibility that the averments might fail to state a cause of action on which the petitioners could actually recover. ... Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy." *Bell v. Hood*, *supra*, 327 U.S. at 682, 66 S.Ct. at 776.

Here, Ms. Fellows clearly states a material federal claim of class employment discimination in violation of a federal statute, Title VII, the sole basis of her suit. Considering the allegations of the complaint as true (as required for review of a dismissal thereof for lack of jurisdiction, *Miller v. Stanmore*, *supra*, 636 F.2d at 988), they would show that the defendant Universal discriminates against females as a class in its employment practices, in violation of federal law.

Thus, under *Bell v. Hood, supra*, her claim could be dismissed for lack of jurisdiction only if her federal class claim were wholly insubstantial and frivolous. In determining whether a federal claim meets this criterion, a two-prong test is used,

> a federal question may be insubstantial either (1) because it is obviously without merit, or (2) because it is clearly foreclosed by previous decisions of the Supreme Court.

Miller v. Stanmore, supra, 636 F.2d at 989. We find neither of these criteria for dismissal are here met and, further, that for reasons to be noted the showing made shows sufficient basis for the district court's jurisdiction of the class action under Title VII as to require it to maintain its jurisdiction of this aspect of the suit.

Title VII Action: Cause of Action

The basic two statutory requirements (although these are not necessarily "jurisdictional") for a Title VII suit are (1) the filing of a complaint with the EEOC and (2) the receipt of the statutory notice of right to sue. *See McKee v. McDonnell Douglas Technical Services Co., Inc.*, 700 F.2d 260 (5th Cir. 1983). In contending that the district court lacked jurisdiction of the class action aspects of the suit, the defendant employer contends that the class subject matter of the lawsuit was not made the subject matter of a timely charge before the EEOC, because Ms. Fellows' initial complaint to the EEOC of sex discrimination related only to herself individually, not to women as a class.

It may well be that gender or "racial discrimination is by definition class discrimination", *General Tele-*

phone Company of Southwest v. Falcon, ____ U.S. ____, ____, 102 S.Ct. 2364, 2370-71, 72 L.Ed.2d 740 (1982),[2] and that we could end our jurisdictional inquiry there. *See also Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982). However, we prefer to rest our ruling upon decisions of this circuit that indicate to us that a class cause of action in this suit may be maintained in district court, despite the circumstance that on its face the initial EEOC charge by the employee literally construed may have manifested only an individual complaint.

In *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970), as in the present instance, the employee's initial charge and amended charge to the EEOC only alleged individual acts of discrimination against her on the basis of her sex and national origin. Subsequent to failure of EEOC efforts to secure conciliation and compliance, the employee filed suit for herself individually and for others of the class. The district court dismissed for failure to state a claim as to those allegations that went beyond the terms of the employee's initial EEOC charge. In reversing the district court's dismissal, *Sanchez* held that, inter alia, the scope of the employee's cause of action could include not only those charges specifically made before

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[2] In approving this principle in *Falcon* with relation to maintaining class actions, the Court further noted the distinguishable merit issues that relate to maintenance of a Title VII class action:

> We cannot disagree with the proposition underlying the across-the-board rule — that racial discrimination is by definition class discrimination. But the allegation that such discrimination has occurred neither determines whether a class action may be maintained in accordance with [Fed.R.Civ.P.] Rule 23 nor defines the class that may be certified. ____ U.S. at ____, 102 S.Ct. at 2370-71.

the EEOC but also "'may encompass any kind of discrimination like or related to allegations contained in the charge'", 431 F.2d at 466. The court stated: "The 'scope' of the judicial complaint is limited to the 'scope' of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." *Id.*

A similar test was applied in *Gamble v. Birmingham Southern Railroad Company*, 514 F.2d 678 (5th Cir. 1975). There, the EEOC charge by black switchmen and the subsequent EEOC investigation had only complained of the denial of promotion opportunities to conductor, but not also of the denial of promotion to higher supervisory positions, as additionally alleged by their suit's complaint. The district court held that, therefore, the latter claim was outside the "permissible scope" of the cause of action based upon the initial EEOC charge and the EEOC investigation. Even though neither the initial charge nor the actual EEOC investigation had included the broadened charge of discrimination asserted by the lawsuit's complaint, we reversed and held that the broadened claim of discrimination was sufficiently "like or related to" the initial charge that an investigation "could reasonably be expected to grow from it," 514 F.2d at 688 — although none had in fact —, so that this broader charge of

discrimination was properly asserted as part of the cause of action based upon the initial EEOC complaint. *Id.*[3]

As in *Sanchez*, in *Gamble* we pointed out that the underlying policies of the Title VII Equal Employment Opportunity Act are not served by limiting judicial relief to technical niceties of the language used by an often unlettered or unsophisticated employee in filing his or her initial grievance with the EEOC. In *Gamble*, quoting with approval from a district court opinion, we stated

> [T]he Civil Rights Act is designed to protect those who are least able to protect themselves. Complainants to the EEOC are seldom [represented] by lawyers. To compel the charging party to specifically articulate in a charge filed with the Commission the full panoply of discrimination which he may have suffered may cause the very persons Title VII was designed to protect to lose that protection because they are ignorant of or unable to thoroughly describe the discriminatory practices to which they are subjected.

514 F.2d at 689.

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[3] The able district court was concerned that the alleged lack of notice of a class basis for the discrimination charges deprived the EEOC of an opportunity to conciliate the class grievances, a preferred mode of resolution. In *Gamble*, we addressed the conciliation issue and found that the conciliation purposes of the act must yield to its more basic purposes to protect persons against employment discrimination, indicating that protecting a merely theoretical right to conciliation (that might not be accepted) by dismissing a subsequent suit, is outweighed by more fundamental purposes of the Act to afford the possibility of administative and judicial relief to employees who are subject to employment discrimination. *Gamble, supra*, 514 F.2d at 688-89.

Sanchez and *Gamble*, then, are authority for holding that a cause of action for Title VII employment discrimination may be based, not only upon the specific complaints made by the employee's initial EEOC charge, but also upon any kind of discrimination like or related to the charge's allegations, limited only by the scope of the EEOC investigation that could reasonably be expected to grow out of the initial charges of discrimination. Other circuits apply a similar test. *Hicks v. ABT Associates, Inc.*, 572 F.2d 960, 966 (3d Cir. 1978); *McBride v. Delta Airlines, Inc.*, 551 F.2d 113, 115 (6th Cir.) *vacated on other grounds, sub nom. Delta Airlines, Inc. v. McBride*, 434 U.S. 916, 98 S.Ct. 387, 54 L.Ed.2d 273 (1977).

EEOC Complaint as to Individual Discrimination: Basis for Class Action?

The defendant Universal would distinguish *Sanchez* and *Gamble*, insofar as applying to the present facts, because *Gamble's* initial EEOC charge included class complaints (although not all of those additionally allowed to be sued upon) and because, it is suggested (it is not clear from the opinion), *Sanchez* by actual EEOC investigation subsequent to the initial charge extended its investigation of the individual's charge to include class discrimination. As we appreciate Universal's argument, it does not contest that under *Sanchez* and *Gamble* the class action could be properly asserted had the unlawyered employee, Ms. Fellows, checked a "class" complaint box or had she more broadly phrased her charge to inclue classwide instead of only individual gender discrimination. "[A] class action can be maintained under the Act even though only one member of the class has filed a charge of discrimination." *Sanchez, supra*, 431 F.2d at 631.

We are not persuaded by the argument that the present EEOC charge by Ms. Fellows could not support a subsequent cause of action for a class of women subjected to the same discrimination or to discrimination like or related to those described by the allegations of that initial charge.

In the first place, for instance, among Ms. Fellows' initial charges is that she "was paid less and discharged because of my sex, female", and that her application for various superior positions in the establishment were denied "because of my sex, female." See note 1 *supra*. Had she stated, instead, that "I was paid less because women are paid less," or "my applications for the superior positions were denied because no women were considered for them," her allegations would have been of class as well as of individual discrimination, so as clearly to justify a class action. Given the liberal construction accorded EEOC charges, especially those by unlawyered complainants, we are inclined to believe that the wordings of her actual and of our hypothetical charges could equally be understood to complain of discriminatory employment treatment of all women applicants and employees, as well as of Ms. Fellows herself.

In any event, the allegations of Ms. Fellows' EEOC charge that she was paid less and denied eligibility for most other paying positions in the business, solely because of her female sex, quite clearly meet the *Sanchez-Gamble* test, in our opinion. The scope of Ms. Fellows' judicial complaint could include class action allegations, since EEOC investigation of class discrimination against women could reasonably be expected to grow out of her allegations in her initial EEOC charge. In fact, when the EEOC instigated its investigation by commencing discovery, it directed questions to Univer-

sal not only as to Fellows' individual situation, but also as to the makeup of Universal's total work force. That these questions were asked suggests the reasonable possibility of a class investigation, and that Universal refused to answer suggests that Universal was aware of and wished to avoid this possibility. Universal's obduracy in attempting to limit the classwide scope of the EEOC's investigation does not militate against the initial charges having afforded a reasonable expectation that the EEOC's investigation could encompass not only Universal's alleged discrimination against Ms. Fellows but also that against all female applicants and employees.

Likewise, although the EEOC did not attempt to obtain compliance when Universal refused to answer, this failure should not be seen as determinative of the scope of the EEOC investigation that could reasonably be expected to grow out of the charge.

Although the EEOC may compel responses to class-directed questions in situations similar to this one, *Georgia Power Company v. Equal Employment Opportunity Commission*, 412 F.2d 462, 468 (5th Cir. 1969), that Commission (which in this suit has filed an amicus curiae brief in support of the employee's contentions), points out that, due to volume and backlog problems, it has adopted a policy of ordinarily limiting its investigations only to those that directly affect a charging party, but without intending to affect that party's right to relief by civil suit "for all discriminatory practices which are like or related to those alleged in the charge which might have been uncovered if the Commission had sufficient resources to investigate all charges more extensively." Taking a Charge, [Compliance Procedures] EEOC Compl. Man. [BNA] § 2.1(e) (May, 1979).

Conclusion

For the foregoing reasons, and in accord with the purposes of Title VII (permitting often-uneducated employees — "'those who are least able to protect themselves'" — to vindicate their rights before first the EEOC and then the courts, *Gamble, supra*, 514 F.2d at 689), we conclude that a dismissal on jurisdictional grounds was error on the part of the district court. We therefore REVERSE the order dismissing the class aspects of Fellows' suit, and REMAND for further proceedings.

REVERSED AND REMANDED.

APPENDIX B

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

LAURA FELLOWS, *Plaintiff,* v. UNIVERSAL RESTAURANTS, INC., *Defendant.*	No. CA3-80-1328-F

ORDER AND MEMORANDUM OPINION

This is a Title VII sex discrimination suit brought by Laura Fellows against the Defendant arising out of Ms. Fellows' brief tenure as an employee at the Old Warsaw restaurant. Shortly after she was discharged by the Defendant Ms. Fellows filed discrimination charges against the Defendant with the Equal Employment Opportunity Commission ("EEOC") alleging that

(1) she had been discharged from her position as a wine stewardess because of her sex,

(2) she was paid less than the male wine stewards during her employment tenure because of her sex,

(3) she was denied a position as a waitress and captain in several restaurants owned by the Defendant for which she applied because of her sex.

Ms. Fellows was hired by the Defendant on January 11, 1980. She was discharged on January 23, 1980. On February 11, 1980, she filled out an EEOC questionnaire. On March 12, 1980, she executed her formal

charge of discrimination with the EEOC. Two weeks later, she informed the EEOC that she had retained counsel to aid her in the prosecution of her discrimination charges. On April 23, 1980, the Defendant responded to EEOC requests for information in connection with the EEOC's investigation. In response to two specific questions, set forth below, the Defendant informed the EEOC that the requested information was beyond the scope of Ms. Fellows charge, and accordingly declined to furnish the information:

> Question 03. Submit a list of all vacancies during the period January 1, 1980 to January 31, 1980, for the positions of Waiter/Waitress, Wine Steward/Stewardess, and Captain at Marios, Les Saisons, and the Warsaw Restaurants; include the job description, and job qualifications, both requisite and preferred, for each vacancy.
>
> Answer 03. Respondent feels this inquiry is beyond the scope of Ms. Fellows' charge. Ms. Fellows was hired as a rotating wine steward trainee who claims sex discrimination because of her discharge.
>
> Question 05. Submit a list of all individuals employed in the Warsaw Restaurant, Marios, and Les Saisons as of January 11, 1980. Include name, sex, date of hire, initial job classification and wage rate, and any subsequent job classifications including date and wage changes.
>
> Answer 05. Respondent feels this inquiry is beyond the scope of Ms. Fellows' charge. The Charging Party claims to have been the object of sex discrimination in the position of rotating wine steward trainee, and her factual allegations

pertain to employment practices in that department.

With respect to other information requested by the EEOC the Defendant complied with the agency's requests. On May 1, 1980, the EEOC held a fact finding conference at which counsel for both the Plaintiff and Defendant were present, as well as Ms. Fellows. The next day the EEOC issued a supplemental questionnaire to the Defendant seeking to gain additional information with respect to Ms. Fellows' charge. On June 3, 1980, the Defendant responded to that request, providing for the most part all of the information requested. With respect to one of the requests, however, the Defendant declined to provide the information requested:

> 04. Submit a list of all individuals employed in the Les Saisons, Old Warsaw, Arthurs, and Marios Restaurants as of May 1, 1980. Include name, sex.
>
> "In question 04., you have requested a list of all Respondent's employees as of May 1, 1980. We do not understand the significance of that date, nor the need for all these names. If, however, the Commission feels there is a compelling and relevant need for this information, please contact the undersigned for discussion".

On September 20, 1980, the Commission issued a right to sue letter to Ms. Fellows, having failed to process her charge within 180 days. The instant suit was commenced October 3, 1980.

In her complaint Plaintiff alleges that the Defendant discriminated against her on the basis of sex with respect to (1) being denied a position as waitress or captain, (2) being assigned the position of wine steward, and (3) being discharged. In addition, Plaintiff

brings this action as to herself and on behalf of a class of females alleging that the Defendant maintains discriminatory policies and practices in the following respects:

(1) Defendant fails to recruit, hire, and promote females on the same basis as males because of discriminatory hiring and promotion practices;

(2) Defendant has discriminated against females in salary and compensation;

(3) Defendant has discriminated against females in the terms and conditions of their employment.

In the prayer for relief Plaintiff seeks a permanent injunction, a declaratory judgment, equitable relief, reinstatement, and attorneys' fees.

In response to Plaintiff's complaint the Defendant has moved to dismiss or strike certain portions of Plaintiff's complaint. In particular, Defendant claims that the Plaintiff's class allegations of across the board discrimination could not reasonably have been expected to have grown out of the Plaintiff's charge filed with the EEOC and that therefore the class allegations should be dismissed because the Court lacks subject matter jurisdiction over those claims. In addition, Defendant moves to have Plaintiff's allegations of jurisdiction under 28 U.S.C. §§2201, 2202 stricken on grounds that these statutes do not confer subject matter jurisdiction upon federal courts. Finally, Defendant moves to strike Plaintiff's prayer for compensatory damages under Title VII. Plaintiff has responded to the motion, and on February 9th, 1981 this Court conducted a hearing at which time counsel for both sides presented oral argument.

I.

The Jurisdictional Issues

It is the well settled law of this Circuit that the filing of a discrimination charge with the EEOC is the essential first step in the administration of Title VII. *See, e.g. Walker v. Jim Dandy*, Slip. Op. 4528 at 4350 (5th Cir. No. 78-2652, Mar. 13, 1981). In a series of three cases the Fifth Circuit has addressed the issue of the scope of subject matter jurisdiction vested in a court hearing a Title VII action in relation to the scope of the discrimination charge presented at the administrative level. *See Falcon v. General Telephone Co.*, 626 F.2d 369, 376-77 (5th Cir. 1980); *Gamble v. Birmingham Southern Railroad Co.*, 514 F.2d 678, 687-89 (5th Cir. 1975); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970). In the instant case, Defendant argues that Plaintiff presented no class allegations to the EEOC at the administrative level, that the EEOC only examined the Plaintiff's individual allegations of discrimination in the course of their investigation, and that, therefore, this Court is without subject matter jurisdiction to hear the class claims. Defendant also contends that the scope of this Court's jurisdiction over Plaintiff's claims is limited to the three allegations of discrimination set forth in the charge filed by Plaintiff with the EEOC. In light of the fact that the Fifth Circuit has not addressed the first issue raised by Defendant, a brief excursion through the jurisprudence of *Sanchez*, *supra*, and its progeny cited above is necessary.

In *Sanchez*, the Plaintiff filed a charge of discrimination with the EEOC by filling out an EEOC form which stated,

> "My complaint was that my boss lady hit me at my rear and about a month before that I hurt my thumb and was out of work for seven days and the company didn't pay me. I hurt my thumb at work."

In a row of boxes representing various categories of discrimination she checked "SEX". After the then relevant ninety day period had expired for the bringing of a discrimination charge based on the incident of which Plaintiff complained, the Plaintiff executed an amended charge of discrimination which stated that "[my] supervisor seemed abrupt and most [sic] vengeful against Negroe and Mexican American women rather than Anglo women." In the amended charge she checked both "SEX" and "NATIONAL ORIGIN" as the types of discrimination involved. The Defendant moved to have the "NATIONAL ORIGIN" portion of the Plaintiff's complaint dismissed, and concluding that the complaint did in fact exceed the scope of the original charge, the district court dismissed the complaint. On appeal, the Fifth Circuit reversed the ruling, and remanded the case to the district court with instructions to hear the national origin claim. In so doing the *Sanchez* Court enunciated a standard to be utilized with respect to determining the proper scope of a Title VII complaint pursuant to the charge filed with the EEOC:

> In *King v. Georgia Power Co.*, N.D. Ga. 1968, 295 F. Supp. 943, Judge Smith held that the allegations in a judicial complaint filed pursuant to Title VII "may encompass any kind of discrimination like or related to the allegations contained in the charge and growing out of such allegation during the pendency of the case before the Commission." 295 F. Supp. at 947. In other words, the "scope" of

> EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.

The *Sanchez* Court considered six factors in reaching its decision. First, the remedial and humanitarian underpinnings of Title VII mandate that the courts must be "extremely reluctant to allow procedural niceties to bar claims brought under the Act." Second, the Court found support in the Commission's relation back amendment, 29 C.F.R. § 1601.11(b), which provided an amended charge relates back to the date of the filing of the original charge if the amendment merely clarifies or amplifies the original charge or cures the technical defects or omissions. Third, the *Sanchez* Court concluded that the crucial element of a charge of discrimination is the factual statement contained therein, and not the legal conclusions that the charging party may draw from the facts as alleged. Fourth, the court concluded that Title VII, and its procedural framework were not designed "for the sophisticated or cognoscenti" and that accordingly the Act should be interpreted to accomplish its remedial purpose. Fifth, the Court concluded that the Charging Party's failure to attach the correct legal conclusion to the facts she alleged in her charge was a mere "technical defect." Finally, the *Sanchez*Court noted that if a more exacting rule were employed, an employer's incentive toward voluntary compliance would be lessened. Accordingly, the court held that nothing in the complaint was beyond the scope of the charge filed with the EEOC.

Five years later in *Gamble v. Birmingham Southern Railroad Co.*, 514 F.2d 678 (5th Cir. 1975), the court once again addressed the issue of the proper scope of a complaint in light of the charge filed with the EEOC. In *Gamble*, the Plaintiff's charge with the EEOC alleged that the Defendant was discriminating against

blacks by its failure to promote switchmen to the position of conductor. At trial the Plaintiffs also sought to adduce evidence that the Defendants discriminated against the Plaintiffs with respect to promotions from the conductor position to that of supervisor. The evidence showed that virtually all supervisors were chosen from the roster of conductors. The trial court found that the allegations concerning the supervisor position were outside the scope of the charge filed with the EEOC and accordingly, limited the scope of the trial to the conductor question. On appeal, the Fifth Circuit reversed this determination, finding that the supervisor complaint was like or related to conductor complaint and could reasonably be expected to grow out of the original charge filed with the EEOC.

In *Gamble* the court acknowledged that the facts before it were somewhat different than those presented in *Sanchez*, for the reason that it was undisputed that the EEOC had not investigated any charges relating to the supervisor level. Thus, it was said that the complaint exceeded the scope of not only the EEOC charge, but also the investigation. In addition, the Defendant argued that it had a right to conciliation with respect to the supervisor question. The Fifth Circuit rejected these contentions, however, and held that the district court should have considered the supervisor issue:

> "... we hold that the district court should have considered the switchmen's claim as to supervisory promotions. The question was 'like or related to' the original charge before the EEOC. The discrimination alleged is of the same type or character as that originally charged, and the same plaintiffs are involved. If blacks cannot be promoted to conductor, then a fortiori they cannot be promoted to supervisor, and in fact have not been."

514 F.2d at 689.

The final chapter in this trilogy of cases is *Falcon v. General Telephone Company*, 626 F.2d 377 (5th Cir. 1980). In *Falcon*, the EEOC conducted an investigation of hiring as well as the promotion practices of the Defendant despite the fact that the charge filed with the EEOC referred only to the Defendant's promotion practices. The *Falcon* Court held that the hiring practices were within the proper scope of a judicial complaint, principally on the ground that "the civil action is much more intimately related to the EEOC investigation than the words of the charge that originally triggered investigation." 626 F.2d at 376 (quoting *Sanchez*, *supra* at 466). In addition, the court noted that the EEOC could reasonably expand the scope of their investigation beyond the scope of the charge after initial inquiries, and that to limit the EEOC's discretion in this area would not be in harmony with the remedial purposes of the Act. Finally, the Court noted the strong connection between hiring and promotion claims.

In the instant case the Defendant presents the following evidence in support of its motion to dismiss the class allegations as outside the proper scope of a judicial complaint:

(1) the formal charge filed with the EEOC on behalf of the Plaintiff which enumerates only the individual claims she asserts in this action;

(2) an affidavit of counsel for the Defendant stating that he represented the Defendant in the administrative process and that at no time did the EEOC advise him that it intended to conduct, or was conducting an investigation of any allegations of class discrimination in connection with

the Plaintiff's charge of discrimination; further, at no time did the EEOC request conciliation or settlement of the Plaintiffs on any basis other than as to the individual allegations;

(3) an affidavit of the Director of the Dallas District Office of the EEOC stating during the administrative investigation into Ms. Fellows' charge the EEOC did not identify the case as one which required class investigation, and neither did it conduct a class investigation of the Defendant; further the case was never assigned to the EEOC's class investigation unit and the investigation was confined solely to Ms. Fellows' individual allegations of unlawful discrimination;

(4) a certified copy of the administrative record as developed by the EEOC which makes no reference to any class allegations or class investigation on the part of the EEOC.

Thus, it is clear that the issue before the Court is cast in terms of an EEOC charge devoid of any class allegations, and of which the EEOC made no class investigation.

The issue then is whether this showing is sufficient to jurisdictionally bar a class claim stemming from the Plaintiff's charge filed with the EEOC.

In support of its motion Defendant cites *Macon v. Bailer*, 451 F.Supp. 140 (E.D. Va. 1978) and *Stubbs v. Bendix Field Engineering Corp.*, 21 FEP Cases 804 (D. Md. 1977). I am of the opinion that the cases are not in point. In *Stubbs*, the court dismissed certain (but not all) class allegations on grounds that the alleged forms of discrimination in the judicial complaint were clearly unrelated to the forms of discrimination

alleged by the Plaintiff in the charge with the EEOC. Nothing in the opinion supports the proposition advanced by Defendant that where there is no charge of class discrimination with the EEOC, and no class investigation, the judicial complaint is limited to the harms suffered by the individual Plaintiff. Likewise, the court in *Macon* found that "[t]he discrimination suffered by the class which Plaintiff seeks to represent is far different from that set forth in the administrative charge." 451 F.Supp. at 141.

Defendant also cites *EEOC v. Mallinckrodt*, 22 FEP Cases 311 (E.D. Mo. 1980). The rationale of the decision in *Mallinckrodt* is dispositive of the instant motion. In that case, after an investigation of the original charge filed with the EEOC, the EEOC "was unable to identify any alleged unlawful employment practice except that which involved the charging party." *Id.* at 314. To allow the EEOC to proceed with a class suit would "be dangerously akin to a 'witch hunt'" and the court granted the Defendant's motion for summary judgment as to the class allegations. Of importance to the case at bar is the finding of the court that the EEOC limited its investigation to claims of the charging party. This is, of course, precisely the same situation before this Court. The EEOC conducted its investigation and there is simply nothing in the record indicating that the investigation uncovered any unlawful employment practice other than that which the charging party alleged. The charging party made no such allegations with the EEOC. To permit class allegations to remain in this case would be to sanction the "witch hunt" condemned in *Mallinckrodt*. There must be some indication of class related unlawful employment practices in the administrative record prior to the institution of a class suit in federal court. Other-

wise, employers will be called on to defend class suits for which there is simply no factual basis prior to the filing of the suit. Further, there is no opportunity for conciliation of such allegations prior to the filing of the suit. To sanction such a practice would distort the purpose of the statutory framework of Title VII. A charging party with absolutely no knowledge of any facts relating to other instances of discrimination files its charge with the EEOC, the EEOC conducts its investigation into the charge and unveils absolutely no instances of discrimination other than those alleged by the charging party, and yet, the employer is called upon to defend a Title VII class suit.

It goes without saying that class suits are burdensome to both the Courts and the employers in sheer terms of the amount of effort expended by each. Prior to any determination as to liability the Court must conduct a class certification hearing, and make findings as to the proper scope of the class. Before this process is invoked I am of the opinion that a Plaintiff must make a showing of factual grounds supporting class allegations.

In the case at bar Plaintiff focuses upon the Defendant's unresponsive attitude towards EEOC requests for information relative to class allegations. I note, however, that the Defendant at the administrative level merely asserted that this information was beyond the scope of the charge, but that if necessary the information would be provided. The EEOC never pursued that information, never having felt the need to conduct a class investigation. Thus, I fail to see the significance of this contention.

In sum I have concluded that the class allegations must be stricken from Plaintiff's complaint on jurisdictional grounds. In opposition to Defendant's motion,

Plaintiff has cited the Court to section 2.1(e) of the EEOC Compliance Manual which states as follows:

> (1) The Commission will ordinarily limit its investigation to the allegation(s) of the charging party;
>
> (2) The decision to limit the scope of investigations is based on the necessity of allocating limited Commission resources;
>
> (3) The fact that a narrow investigation was conducted by the Commission does not reflect the scope of the Commission's investigation which might reasonably have grown out of a charge and therefore the decision to limit investigation is not intended to, and should not affect the charging party's right to seek relief in a private suit for all the discriminatory practices which might have been uncovered if the Commission had sufficient resources to investigate all charges more extensively; ...

Aside from the fact that the EEOC's pronouncements above are clearly contrary to the law of this Circuit, see *Falcon* at 376 (the civil action is much more intimately related to the investigation than the words of the charge), it is apparent that this passage is not applicable to the class issue presented in this case. Further, the affidavit of Lorenzo Ramirez, which is uncontroverted, indicates that the EEOC does have a procedure for identifying those charges which require class investigations, that there is a class investigatory unit, and that the EEOC never identified Ms. Fellows' charge as one requiring class investigation. Hence, it is clear that during the administrative level the possibility of classwide unlawful employment practices was simply never considered. Under these circumstances, I believe that the class claims are jurisdictionally barred.

II.

Compensatory Damages Under Title VII.

Defendant has also moved to have Plaintiff's prayer for compensatory damages under Title VII stricken. Plaintiff has not responded to this particular contention, but in any event it is clear that the relief authorized by the statute in question is purely equitable. 42 U.S.C. §2000e-5(g). *See Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969). Therefore, Defendant's motion to strike Plaintiff's prayer for compensatory damages is well taken.

III.

Jurisdiction Under 28 U.S.C. §§2201, 2202

It is well established that the declaratory judgment provisions of the judicial code, 28 U.S.C. §§2201, 2202 are not independent sources of federal court subject matter jurisdiction, and therefore Defendant's motion to strike Plaintiff's jurisdictional allegations pursuant to these statutes is granted.

Conclusions

In sum I have concluded that Plaintiff's class allegations should be stricken, that Plaintiff's prayer for compensatory damages should be stricken, and that the assertion of the declaratory judgment provisions of the judicial code as independent sources of federal court subject matter jurisdiction is improper.

So ORDERED this 16th day of June, 1981.

/s/ ROBERT W. PORTER
United States District Judge

APPENDIX C

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 82-1125

LAURA FELLOWS, *Plaintiff-Appellant,* v. UNIVERSAL RESTAURANTS, INC., *Defendant-Appellee.*	**Appeal From The United States District Court For The Northern District of Texas.** D.C. Docket No. CA3-80-1328F

Entered March 28, 1983

Before WISDOM, RUBIN and TATE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and the same is hereby, reversed and that this cause be and the same is hereby remanded to the said District Court for further proceedings in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that defendant-appellee pay to plaintiff-appellant the costs on appeal to be taxed by the Clerk of this Court.

MARCH 28, 1983

ISSUED AS MANDATE: April 19, 1983

APPENDIX D

United States Code, Title 42

§ 2000e-2

(a) It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

§ 2000e-5

* * *

(f)(1) If ... the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent ... named in the charge. ... If ... the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission ... shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved. ...

TYPOGRAPHICS LEGAL INC DALLAS TEXAS